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No. 05-1448

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IN THE

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

An employer with conflicting interests as sponsor, trustee and administrator of its employees' pension plans may decide to terminate the plans. The questions presented are:

1. Whether the employer owes a fiduciary duty under ERISA to consider all options available for providing benefit liabilities in terminating the plans.

2. Whether merger into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent PACE International Union recently merged with USW, AFL-CIO. PACE and USW were and are unincorporated associations.

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BRIEF IN OPPOSITION

STATUTES AND REGULATIONS

Respondents accept the statutes and regulations listed by petitioner, but add a fuller selection from 29 U.S.C. § 1412:

> (a) A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.
>
> (b) No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

STATEMENT OF THE CASE

The narrative in the Bankruptcy Court's judgment is accurate. Respondents hereby incorporate it. App. 54-62.

However, respondents offer this abbreviated account to correct misstatements in petitioner's *Statement of the Case*, particularly the third paragraph on page 7.

In the summer of 2001, Crown Vantage, Inc., was preparing a Chapter 11 bankruptcy liquidation plan. The Directors of Crown Vantage, Inc., were also the trustees of seventeen pension plans covering hourly employees. The trustees were both the sponsor and the administrator of the plans. Because Crown was winding up its affairs in preparation for its own demise, its pension plans had to be wound up, too.

Crown was considering the purchase of an annuity to provide plan benefits to the participants. The employees' bargaining representative, PACE International Union, offered to fold all seventeen plans—some overfunded, some underfunded—into its Taft-Hartley plan, the PACE Industry Union-Management Pension Fund (PIUMPF). Crown promised to consider that option. "[PIUMPF's] offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers," say the Board minutes of September 26, 2001. SER 3.

On October 4, 2001, during bankruptcy proceedings, Crown promised in open court that it would not take final action on the pension plans without informing the court and PACE, so that PACE would have an opportunity to be heard. SER 1, 15:14-16:8.

On October 10, however, without notice to the court or union, Crown committed $84 million to Hartford Life Insurance Company to provide an annuity covering twelve of the pension plans. Crown abandoned five underfunded plans. After the premium was paid, nearly $5 million remained in

the twelve plans, which Crown intended to take as a "reversion." Petitioner states at page 7:

> Based on a variety of advantages provided by termination through annuitization, including but not limited to the financial security of the annuity, Crown's board approved and immediately consummated the purchase of an $84 million annuity from Hartford Life Insurance Company. . . In opting to terminate the plan by purchase of the Hartford annuity, the Crown Board did not accept PACE's alternative merger proposal.

To the extent this paragraph implies that Crown *compared* merger with annuitization, it is contrary to the evidence and the findings of the courts below. Hartford's financial stability was not an "advantage" over PIUMPF, since PIUMPF was also financially stable. PIUMPF supplied Crown with all requested financial information, but Crown never looked at it, or had it evaluated by an expert. The Bankruptcy Court found that Crown "gave no serious consideration to the PIUMPF merger proposal"—a finding that is amply supported by the record. App. 62.

One true advantage of merger was that PIUMPF formally proposed that "*All* of the liabilities of the Crown Vantage Plans shall become the liabilities of the PACE Fund." (SER 10, page 4, emphasis added.) The Petition's *Statement of Facts* implies that the Hartford annuity would also have provided "all benefit liabilities under the plan," as required by 29 U.S.C. § 1341(b)(3)(A)(i). That implication is not supported by the record and is contrary to fact.

The Bankruptcy Court held a full-day hearing on November 29, 2001. On December 11, 2001, the Court found that Crown had breached its fiduciary duties to the participants by failing to make an adequate investigation of its options. App. 64-67. The court therefore imposed a constructive trust on the reversion for the benefit of participants. App. 77-83.

Both the District Court and the Ninth Circuit affirmed the finding of a fiduciary breach under ERISA. As the administrator implementing a termination, Crown owed a duty of undivided loyalty to participants. Crown was obliged to keep "an eye single to the interests of the participants." At the same time, Crown owed a conflicting duty to its creditors to maximize assets in the bankruptcy estate. The District Court and the Ninth Circuit correctly applied the universally accepted rule of *Donovan v. Bierwirth*, 680 F.2d 263 (2nd Cir. 1982), *cert. den.*, 459 U.S. 1059. *Bierwirth* requires conflicted trustees to make a scrupulous and impartial investigation of their options. On appeal, Crown never challenged the finding that it failed to make such an investigation.

The case has been remanded to the Bankruptcy Court. Further proceedings are pending there, including respondents' motion for leave to amend the complaint.

REASONS FOR DENYING PETITION

Respondents respectfully suggest there are no compelling reasons to grant this petition for writ of certiorari.

The situation presented here is uncommon and of no great national importance: An employer, simultaneously wearing the hats of sponsor and plan administrator, is faced with a choice between purchase of an annuity and merger with another pension plan in the course of plan termination. A careful search of published decisions, legislative history, and scholarly works shows no discussion of a case with similar facts, except for a series of PBGC *Opinion Letters*, which favor the respondents, not the petitioner. This suggests that the scenario is rare.

The Ninth Circuit's decision is not "in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). Nor is the decision in conflict with administrative regulations.

The Ninth Circuit decision is an excellent application of settled law and should not be disturbed. But if the Ninth Circuit erred in interpreting the statute or regulations, the error can be easily and appropriately corrected through Congressional action or the administrative rulemaking process.

I. TRUSTEES ACTING WITH CONFLICTED INTERESTS OWE A FIDUCIARY DUTY TO PARTICIPANTS TO MAKE AN IMPARTIAL INVESTIGATION OF ALL AVAILABLE OPTIONS

The decision to terminate a pension plan is generally a sponsor function carrying no fiduciary duty. But ERISA places the duty of carrying out the termination with the plan administrator. 29 U.S.C. § 1341. Fiduciary duties apply. *Waller v. Blue Cross of California*, 32 F.3d 1337, 1343 (9th Cir. 1994). As part of the termination process, the administrator must make a "final distribution" of the plan assets. The administrator must either purchase an annuity from an insurance company or "otherwise fully provide all benefit liabilities." 29 U.S.C. § 1341(b)(3)(A)(ii). In this case, the Ninth Circuit held that, in terminating a pension plan, one permissible method of "fully providing all benefit liabilities" is merger into another plan, as ERISA permits at 29 U.S.C. § 1412. Therefore the administrator was obliged to consider that possibility.

Crown Vantage, Inc., was both sponsor and administrator of its employees' pension plans. Its Board of Directors met several times to consider how to wind up the plans, including the options of annuitization or merger. Board minutes show no distinction between sponsor and administrator functions. SER 2-4. The same confusion, whether willful or naïve, was demonstrated by individual trustees. Board member and defendant Donna Weaver testified:

> But the board itself is—it's the same. In other words, we—I don't see the distinction. We have never—you

> know, that's not something we've done in these meetings traditionally, is say, "Okay, this half hour, we're wearing this hat."

ER 2, 253:4-8.

Not only were defendants wearing two hats—but the hats were, so to speak, tilted in opposite directions. As plan sponsor, the Board of Directors had an interest in maximizing the money it could make from any source, including a reversion. As plan administrator, however, its sole interest was required to be that of the participants and beneficiaries. These interests conflicted with each other.

The courts have already faced and solved the two-hat problem, with no split among the circuits. The leading case is *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir. 1982) *cert. den.*, 459 U.S. 1069 (emphasis added):

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after *careful and impartial investigation*, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an *eye single* to the interests of the participants and beneficiaries.

One court recently explained:

> The presence of conflicting interests [maximizing reversion vs. protecting participants] imposes on fiduciaries the obligation to take precautions to ensure their duty of loyalty is not compromised . . . [They] may have to at a minimum undertake an intensive and scrupulous independent investigation of the fiduciary's options. . .

Bussian v. RJR Nabisco, Inc. 223 F.3d 286, 299 (5th Cir. 2000) [internal quotation marks omitted]. *See also, Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994) and *Pilkington PLC v. Perelman*, 72 F.3d 1396 (9th Cir. 1995).

The Crown Directors blurred their roles. That is what triggered the duty of an "intensive and scrupulous independent investigation of the fiduciary's options."

Petitioner argues that merger is exclusively a plan sponsor function. But that observation does not solve the two-hat problem.[1] The Crown Board of Directors decided to terminate the plans for whatever business reasons it had. In implementing that decision, the same Board of Directors made or did not make various investigations and then took certain steps to reach their goals. In making those investigations and taking those steps, in whose interests were they working? What was their goal? An administrator, in discharging its fiduciary duties, is obliged to consider all permissible options. Why should the administrator *not* investigate options and, if necessary, lay them out before the sponsor? What social, political, or legal purpose is served by encouraging ignorance of what options might exist?

In the present case, merger was a practical, achievable option for fully providing benefits. The Crown Directors did in fact vote to merge twelve pension plans into one in order to purchase the annuity. SER 14. That the Crown Directors (as sponsor) could merge the plans in order to carry out the termination plan of the Crown Directors (as administrator) shows that there was no impediment to merging plans in order to carry out the PACE proposal. Had the Directors given adequate consideration to the proposal—and had they chosen the proposal—the Directors could have carried out the decision easily.

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[1] Indeed, the observation is not entirely accurate. The fact that a sponsor has a certain power does not necessarily prevent the administrator from exercising the same power. *See, DelGrosso v. Spang & Co.*, 776 F.Supp. 1065, 1068 (W.D.Pa. 1991), *aff'd.*, 968 F.2d 12 (3rd Cir. 1992) ("The right of plan sponsors to terminate pension plans. . . does not preclude plan administrators from also terminating plans, even in the face of employer opposition to termination.").

In sum, the Crown Board of Directors was in a conflict of interest. There is an established method under ERISA for dealing with such conflicts: a scrupulous, independent investigation of the options. The Bankruptcy Court, the District Court, and the Ninth Circuit got it right.

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS

Petitioner argues that the Ninth Circuit decision conflicts with *Malia v. General Electric Co.*, 23 F.3d 828 (3rd Cir. 1994), *cert. den.*, 523 U.S. 956 (1994), and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). Petitioner also claims a conflict with *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

There is no conflict. In *Malia*, Corporation 1 bought out Corporation 2, which became a wholly-owned subsidiary. Corporation 1 decided to merge the two pension plans into one, and to continue the merged plans under its own sponsorship. Termination was never an issue. The court in *Malia* observed that

> Under ERISA, the roles of plan administrator and plan sponsor are distinct. The plan administrator owes a fiduciary duty to the plan participants; the plan sponsor, *as long as it is not acting as an administrator*, generally does not.

23 F.3d at 833 (emphasis added). In *Malia*, the merger decision was a pure business decision, touching on no administrator functions. Under those circumstances, the employer owed no fiduciary duty to the participants.

In 1950 the employer in *Sutter* established two separate pension plans for the same employees, one of which allowed employee contributions. In 1961 the employer merged the two plans into one, adopting several formulas to calculate benefits, based on years of service, contributions, and other

factors. Over the decades the employer amended the plan in various ways, including changes in the formulas. In 1984 the employer considered a further amendment concerning withdrawn contributions, but decided against it. As in *Malia*, the plan in *Sutter* was ongoing under the employer's sponsorship. Ending the plan was never an issue. No administrator function was involved in the merger or amendment of the plan. The *Sutter* court correctly held the employer as sponsor had no fiduciary responsibility to the participants.

The trio of Supreme Court cases cited by petitioner hold that "In general, an employer's decision to amend a pension plan concerns the composition or design of the plan and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Hughes*, 525 U.S. at 444. And in *Lockheed*, this Court observed, "only when fulfilling certain defined functions. . . does a person become a fiduciary. . ." 517 U.S. at 890.

And that is the difference between the cited cases and the present one. Although the decision to terminate a plan is generally a sponsor function, ERISA places implementation expressly and exclusively in the hands of the administrator. 29 U.S.C. § 1341. It is a "defined function" of the administrator. Under Section 1341(b)(3)(A), the administrator has a choice of options in providing full benefits and, of course, a concomitant duty to investigate those options. The cases cited by petitioner do not deal with termination procedures, or with the employer as administrator, or with an actual conflict between the employer as sponsor and employer as administrator.

When an employer chooses to take on the functions of an administrator, the employer also takes on the fiduciary obligations of an administrator. *Varity Corp. v. Howe*, 516 U.S. 489, 498-505 (1996). For instance, in *District 65, UAW v. Harper & Row, Publishers, Inc.*, 670 F.Supp. 550 (S.D.N.Y.

1987), the employer made a decision about the final distribution of plan assets in a termination—an allegedly unreasonable interest rate assumption in calculating the amount of lump-sum distributions. The court held that the employer could be liable as a fiduciary for two reasons. First, it was exercising "actual control over the disposition of plan assets." Secondly, it was "liable as a fiduciary because its acts with respect to implementing the termination required discretionary decisions on its part." *Id.* at 556. The same two factors are present in this case.

Even with an allegedly "pure" sponsor function such as amendment, the employer-as-administrator is obliged to investigate options so that the employer-as-sponsor can make an informed decision. *Scardelletti v. Bobo*, 897 F.Supp. 913, 917-919 (D.Md. 1995), *affirmed and reversed on other grounds*, 265 F.3d 195 (4th Cir. 2001). *See Devlin v. Scardelletti*, 536 U.S. 1 (2002), for subsequent history.

In sum, the Ninth Circuit's decision here rests on well-established ERISA principles and is consistent with the law of this Court and other federal courts.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE ADMINISTRATIVE AGENCIES' INTERPRETATION OF ERISA; VIEWS ADVANCED FOR THE FIRST TIME IN AN *AMICUS* BRIEF ARE ENTITLED TO LITTLE DEFERENCE

Petitioner argues that this Court should give deference to the views of the Pension Benefit Guaranty Corporation and the Department of Labor, as those views were expressed in their amicus briefs in support of rehearing in the Ninth Circuit. Respondents agree that their views are entitled to some deference. But opinions stated the first time in an amicus brief are entitled to little if any consideration.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984), the question was whether the term "stationary source" in the Clean Air Act referred to a single polluting device or to multiple devices within a single plant. The Environmental Protection Agency, after going through a formal rulemaking procedure and considering all public comments, promulgated a regulation that explicitly addressed the question. The Supreme Court held that, under those circumstances, federal courts should defer to the agency's decision.

But courts do not give *Chevron* deference to every expression of opinion by an administrative agency. As this Court recently explained:

> The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. . . The approach has produced a spectrum of judicial responses, from great respect at one end, *see, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984) ("'substantial deference'" to administrative construction), to near indifference at the other, *see, e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore v. Swift & Co.*: "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

United States v. Mead, 533 U.S. 218, 227-228 (2001), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

A litigation brief, especially an amicus brief, while entitled to consideration according to its persuasive power, is not binding on the courts. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988); *Padash v. INS*, 358 F.3d 1161, 1168, note 6 (9th Cir. 2004). *See also, Shikles v. Sprint/ United Management Co.*, 426 F.3d 1304, 1315-1316 (10th Cir. 2005).

A. The Ninth Circuit's Decision Is in Accord with Applicable Administrative Regulations

The core regulation here is 29 CFR § 4041.28(c)(1) (emphasis added). When PBGC first proposed this section, it read:

> The plan administrator shall, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all benefit liabilities (determined as of the termination date). In the case of benefit liabilities that must be provided in annuity form, the distribution shall be made *by purchasing irrevocable commitments from an insurer* selected in accordance with the fiduciary standards of Title I of ERISA.

62 *Fed. Reg.* 12508, 12515 (3/17/97). That regulation might have supported petitioner's argument. But when it actually promulgated the regulation, PBGC rewrote it to include the words "or in another permitted form":

> The plan administrator must, in accordance with all applicable regulations under the [Internal Revenue] Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

62 *Fed. Reg.* 60424, 60434 (11/7/97). That is the current regulation, and it supports respondents' position.

In the long course of this litigation, respondents have repeatedly challenged petitioner to name a regulation that the proposed merger would violate, but petitioner never did so.

Now, for the first time in this petition for certiorari, petitioner cites PBGC regulation 29 C.F.R. § 4041.23(b)(9). This Court should not consider the argument at all in this petition for certiorari.

Section 4041.23(b)(9) requires that the notice of termination to participants include a notice that "PBGC's guarantee is extinguished." 29 C.F.R. § 4041.23. Since a merger would not extinguish PBGC's guarantee—but would rather shift it from the single-employer insurance program to the multiemployer insurance program—the required termination notice could not possibly be correct for a merger. Therefore mergers are not permissible. So runs the argument—though it sounds a great deal like the tail wagging the dog.

In any case, the argument is unsound. The premise that a termination notice must include an "extinguishment" clause is incorrect. One sort of termination is a "spin-off/termination," in which one plan transfers assets and liabilities to a newly created plan, then terminates, with the employer taking the reversion. Although it is a form of termination, PBGC will continue to guarantee benefits in the newly created plan. What, then, of the "extinguishment" clause? In such a case, 29 CFR § 4041.23(c) requires the administrator only to "provide a notice describing the transaction to all participants." In other words, the "extinguishment" clause is required when there will indeed be an extinguishment, but not otherwise. It is true that 29 CFR § 4041.23(c) refers only to spin-off/terminations—not to mergers. But the only difference between a spin-off/termination and the present case is that the receiving plan here, instead of being newly created, is an already existent multiemployer plan. Unless the failure to mention mergers in this obscure regulation is read as an

implicit prohibition, it means only that the PBGC regulations do not expressly cover all possible situations.[2]

Respondents suggest that if the PBGC regulations have gaps, flaws, conflicts, or ambiguities, that agency, rather than this Court, is in the best position to remedy those deficiencies through the normal rule-making process.

B. The Ninth Circuit's Decision Is in Accord with PBGC Opinion Letters

As it happens, the PBGC has directly addressed the question of whether ERISA permits "a transfer of assets and liabilities from a single-employer to a multiemployer plan, with a resulting termination of the single-employer plan." *Opinion Letter 85-25* (10/11/85). Appendix D *infra* at 14a.

Opinion letters are not entitled to full *Chevron* deference since they have not gone through the formal process of rule-making. They are, however, "entitled to great weight" when they interpret the agency's own regulations. *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005). *See, e.g., Mead Corp. v. Tilley*, 480 U.S. 714, 722 (1989) ("The PBGC consistently has expressed [a certain] view in Opinion Letters addressing proposed plan terminations.").

Before we examine *Opinion Letter* 85-25, let us look at its context.

29 U.S.C. § 1341(b) was enacted as part of the Single Employer Pension Plan Amendments Act of 1986 (P.L. 99-272, Title XI). In the preceding years, plan sponsors had engaged in all sorts of shenanigans to reach surplus assets in

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[2] In its amicus brief on petition for rehearing, PBGC pointed to other regulations which, according to PBGC, impliedly suggest that merger is not a permitted form of guaranteeing benefits in a termination. If the PBGC files an amicus brief here, respondents intend to file a supplemental brief.

their pension plans without terminating the entire plan. The basic maneuver was to transfer assets and liabilities among plans so that one plan would be left with some assets but no liabilities. That one plan would then be terminated with the plan sponsor pocketing the assets as a reversion. The remaining plans would continue to provide benefits to the participants—but of course there would be fewer assets for that purpose.

To deal with these abuses, three regulatory agencies, the PBGC, the Department of Labor, and the Internal Revenue Service, jointly issued "*Implementation Guidelines*" on May 23, 1984, appended at page 1a.[3] The basic notion of the *Guidelines* was that before a plan sponsor may receive a reversion from a termination, an annuity should, in general, be purchased for the affected participants. An annuity guarantees that participants will receive their benefits, regardless of how the plan sponsor manipulates the pension plans or for what purpose. Participants will not be left in an ongoing but financially shaky pension plan.

But the *Guidelines* were not intended to prevent reversions or require annuities when there was some sound, independent business reason for the spin-off, merger or transfer. The *Guidelines* apply only when the maneuvers have no economic meaning except to enable the sponsor to reach surplus assets. In 1985, the PBGC issued a series of Opinion Letters to explain the reach of the *Guidelines*.

In *Opinion Letter* 85-11 (5/14/85), Appendix B *infra* at 6a, an employer had sound business reasons for splitting a pension plan into two. The PBGC stated that an employer could terminate one of the two plans and take a reversion, *without purchasing an annuity*, because it had a good reason for making the split in the first place.

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[3] Apparently these *Guidelines* never went through the rule-making process.

In *Opinion Letter* 85-21 (8/26/85), Appendix C *infra* at 10a, an employer (after collective bargaining) wished to create a new pension plan for unionized employees. The employer wanted to transfer assets and liabilities to the new plan, leaving surplus assets in the original plan, terminating the same, and taking a reversion. This was acceptable to the PBGC.

Finally, in *Opinion Letter* 85-25 (10/11/85), Appendix D *infra* at 14a, the employer wished to terminate a plan and take the reversion. The union proposed that instead of purchasing an annuity, the employer transfer assets and liabilities to a multiemployer plan. The PBGC was asked whether the *Guidelines* prevented the employer from taking a reversion in this situation. The PBGC stated that ". . . a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which [the Guidelines] apply." The PBGC went on to state, understandably, that the multiemployer plan must be financially sound and that the amount of assets transferred must be commensurate with the transferred liabilities. But there was nothing inherently wrong or impossible about the proposed transaction. The present case is on all fours with *Opinion Letter* 85-25. Indeed, this situation presents a stronger case, since there could hardly be a better reason for terminating a plan than the liquidation of the employer in bankruptcy.

These Opinion Letters demonstrate that under ERISA a termination (and consequent reversion) does not require the purchase of an annuity. It does require that the benefit liabilities be protected, but this can be accomplished through a successor plan or a transfer of liabilities and assets to a multiemployer plan, as in *Opinion Letter* 85-25.

Those Opinion Letters were contemporaneous with Congress's consideration and passage of the Single Employer Pension Plan Amendments of 1986, which contained Section

1341(b)(3)(A). *See* H.R. Rep. 99-241 for background and history. The legislation accords completely with the Opinion Letters just discussed. It shows the intention of Congress that in the course of a termination, the participants must have their benefits fully protected, *either* through an annuity *or* through some other mechanism which accomplishes the same purpose.

IV. THE DECISION DOES NOT "DESTABILIZE" ERISA LAW IN THE NINTH CIRCUIT

A. The Ninth Circuit Decision Does Not Put the Benefits of Plan Participants at Risk

Petitioner argues that "a merger simply does not guarantee that plan participants will receive their full plan benefits." Pet. at 15. The argument was raised for the first time in its *Petition for Rehearing* in the Ninth Circuit and should not be considered now. *United States v. Patzer*, 284 F.3d 1043 (9th Cir. 2002).

In any event, the argument verges on the absurd. Before one plan can merge with another, the new merged plan must provide the same benefits as before, 29 U.S.C. § 1412(b). Petitioner argues (at pages 20 and 21) that a multiemployer pension plan might become insolvent. True—but so might an insurance company. *See, e.g., Waller v. Blue Cross of California*, *supra*, 32 F.3d 1337 (9th Cir. 1994). Petitioner argues that when a multiemployer plan becomes insolvent, PBGC will guarantee participants only $13,000 per year. That is also true—but it is a strange argument here. If an insurance company becomes insolvent, the PBGC guarantees nothing. PBGC *Opinion Letter 91-1* (1991).

B. The Decision Below Does Not Thwart ERISA's Objective of Encouraging Employers to Fund Pension Plans Adequately

Petitioner argues that requiring plan administrators to consider merger as an alternative to purchase of an annuity would

somehow "reduce or eliminate the plan sponsor's entitlement to residual assets," and thereby discourage adequate funding. That is a policy argument best left to Congress.

Congress has already spoken to the issue. First, Congress has enacted tax legislation designed to prevent overfunding of plans. 26 U.S.C. § 404(a)(1).

Secondly, when it enacted Section 1341(b)(3)(A) in 1986, Congress did not intend potential reversion of surplus assets to act as any sort of incentive for employers. The Committee on Education and Labor stated:

> [T]he Committee expressly states that nothing in this legislation is intended to express an opinion on the legality or desirability of the current practice of termination of overfunded pension plans and recapture of excess assets by plan sponsors.

H.R. Rep. 99-272, p. 296. In other words, while it might strike some as wise policy to encourage overfunding, it is not the policy of Congress.

Finally, when it enacted 29 U.S.C. § 1412 in 1980, Congress's purpose was not only to permit mergers but to encourage them.

> The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. This facilitates the Committee's *purpose of encouraging mergers* which expands a plan's contribution base to provide greater stability.

H.R. Rep. 96-869 p. 87 (emphasis added). That is still sound policy.

In sum, merger does not conflict with Congressional policy, but accords with it.

C. The Decision Below Does Not Jeopardize PBGC's Interest in Obtaining Insurance Premiums

Petitioner never raised this argument below. It should not be considered now.

In any event, the argument is unsound. Indeed, it is backwards. When a plan terminates through purchase of an insurance company annuity, premiums to PBGC cease. When a plan merges into another plan, premiums continue. 29 U.S.C. § 1307(e)(1),

V. THE DECISION BELOW IS NOT ERRONEOUS

A. ERISA Permits Termination Either Through Purchase of an Annuity or Through Merger

Petitioner argues, "The crux of the Ninth Court's decision is its conclusion that ERISA permits termination of a single-employer pension plan by merger into a multi-employer pension plan. This conclusion is erroneous because. . ."

Even if the Ninth Circuit's conclusion is erroneous, there is no compelling reason for this Court to hear the matter. Congress frequently amends ERISA and the Ninth Circuit's supposedly erroneous conclusion could be corrected with the change of a few words—for instance, by striking Section 1341(b)(3)(A)(ii). Which would make the purchase of an annuity mandatory.

Petitioner (or, rather, Crown Vantage, Inc.) did not raise this issue at the trial stage in Bankruptcy Court.[4] It was first raised on appeal to the District Court.

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[4] In its decision, the Ninth Circuit stated, "As in the bankruptcy and district courts, Crown argues that it did not breach its fiduciary duties. . . because merger into a multiemployer plan is an impermissible means of terminating a pension plan under ERISA [and] its implementing regulations." App. 3. Respectfully, the Ninth Circuit was mistaken. In the

The central premise of petitioner's argument is that mergers and termination are "mutually exclusive" under ERISA. Petitioner cites *Franklin v. First Union Corp.*, 84 F.Supp.2d 720 (E.D.Va. 2000), for the proposition. *Franklin* is not apt. The present case arises under 29 U.S.C. § 1341, which applies only to defined benefit plans, like the Crown plans. 29 U.S.C. § 1301(a)(15). *Franklin* concerned defined contribution plans, where both the law and the policy considerations are vastly different.

It is true in a trivial sense that a merger is not a "termination". But neither is the purchase of an annuity a "termination." ERISA defines the "termination" of a single-employer defined benefit plan in operational terms. It is a scripted process:

(1) the plan administrator must give notice to the participants and the PBGC, 29 U.S.C. § 1341(b)(2)(A) and (B);

(2) the PBGC reviews the notice, Section 1341(b)(2)(C);

(3) the plan administrator makes a "final distribution", Section 1341(b)(2)(D); and

(4) the plan administrator certifies that the distribution has been made, Section 1341(b)(3)(B).[5]

"Final distribution" is one step in the process. Section 1341(b)(3)(A) (emphasis added), describes the methods available to plan administrators for "final distribution":

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bankruptcy court, Crown argued only that it owed no fiduciary duty because it was a plan sponsor, and that it adequately fulfilled any fiduciary duty. Crown raised the "impermissible means" argument for the first time in its appeal to the District Court. It was an afterthought.

[5] *DelGrosso v. Spang & Co.*, *supra*, 776 F.Supp. at 1068, gives a concise history of Section 1341.

> . . . In connection with any final distribution of assets pursuant to the standard termination of the plan . . . the plan administrator shall—
>
> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan ***or***
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, ***otherwise fully provide all benefit liabilities*** under the plan. . . .

The phrase "otherwise fully provide all benefit liabilities" is not defined—but its meaning is plain enough: the alternative to an annuity—whatever that alternative may be—must provide at least the same benefits as the terminating plan.[6] The gist of Crown's argument is that although Section 1341(b)(3)(A)(ii) permits a plan administrator to "otherwise fully provide all benefits," it implicitly excludes a transfer of assets and liabilities as a means of doing so. But on its face, Section 1341(b)(3)(A) permits *any* method that will "otherwise fully provide all benefits liabilities under the plan," provided they are consistent with the plan documents and applicable regulations. The transfer of assets and liabilities from one plan to another, or merger, is of course expressly permitted under ERISA, 29 U.S.C. § 1412(b), and applicable regulations, like 26 C.F.R. § 1414(*l*).

When Congress amended Section 1341 in 1986, it did so with knowledge that Section 1412, permitting the merger of single and multiemployer plans, was already on the books and in the same title. A careful reading and re-reading of the 1986 legislative history reveals no suggestion that Congress preferred annuities to other methods of providing benefits to retired workers, or that it preferred insurance companies to

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[6] The term "benefit liabilities" means simply "benefits," 29 U.S.C. § 1301(a)(16)—i.e., the periodic payments to which beneficiaries are entitled from retirement or disability until death.

multiemployer plans as a provider of benefits. Congress's only purpose was to assure full payment of pensions upon termination.

> Under a standard termination, the plan must contain sufficient assets to pay for the benefit entitlements of all participants and beneficiaries. . . [P]articipants and beneficiaries will receive all benefits to which they are entitled under the terms of the plan.

H.R. 99-241, page 295. Purchase of an annuity can accomplish that purpose. So can merger into another plan.

B. Other Arguments Advanced by Petitioner Lack Merit

The petition lists six areas in which merger and termination requirements supposedly conflict. None withstands scrutiny.

First, petitioner states that termination allows for reversion while merger does not. Not so. As PBGC *Opinion Letter* 85-25 makes clear, reversion following merger is possible. The PIUMPF proposal happened not to provide for a reversion, but nothing in the law precludes it. Petitioner cites 26 C.F.R. § 1414(*l*)-1(b)(2), but that section concerns a different issue: the segregation of transferred funds and transferred liabilities.

Second, petitioner argues that a merger does not "fully provide for all benefit liabilities." Respondents answer this argument above in Part V Section A at 21.

Third, petitioner argues that Section 1341 requires "distribution" among the participants, but in a merger the funds are mixed into the multiemployer plan generally. That is true—but it is also true of the purchase of an annuity, where the premium becomes an asset of the insurance company and becomes available to pay all claims against the company.

Fourth, petitioner argues that PBGC coverage continues after a merger but ceases when an annuity is purchased. Re-

spondents consider that to be an excellent result and in no way contrary to any portion of ERISA.

Fifth, Petitioner argues that merger does not end a plan sponsor's obligation to pay PBGC premiums. The argument is wrong. Under 29 U.S.C. § 1307(e)(1), the plan sponsor of a single-employer plan is the "designated payor" of premiums. But when the single-employer plan terminates through merger, the plan administrator of the multi-employer plan becomes the "designated payor". The original plan sponsor is off the hook but PBGC will continue to receive premiums.

Sixth and finally, petitioner argues that the termination notice requirements cannot be fulfilled in a merger. Respondents address the issue above in Part III A at 13.

In sum, nothing in ERISA or the surrounding regulations preclude merger as a means of "otherwise providing" for benefit payments in a termination.

C. Scrupulous Investigation of Options Is a Fiduciary Duty Owed by the Plan Administrator

Petitioner concludes his argument by repeating that a decision to merge is a sponsor function. As a matter of abstract black-letter law, the assertion may have some merit—but it misses the point of this case.

Acting as plan administrator, Crown Vantage, Inc., was obliged to consider all available options in the termination process. Merger was an option available to Crown. Crown nonetheless deliberately failed to investigate that option, thereby reaping—or attempting to reap—a windfall of $5 million dollars from overfunded plans, while at the same time abandoning underfunded plans.

CONCLUSION

For all of the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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June 12, 2006

APPENDIX

APPENDIX A

[Logo] **NEWS**

Pension Benefit
Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

FOR IMMEDIATE RELEASE
May 23, 1984

CONTACT: Peter A. Kirsch, Director
Communications & Public
Affairs Dept.

or

Jane McVicker
Public Affairs Specialist
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ERISA AGENCIES ANNOUNCE IMPLEMENTATION GUIDELINES ON ASSET REVERSIONS

The Pension Benefit Guaranty Corporation (PBGC) announced today that along with the Treasury Department and the Department of Labor, it has agreed to joint implementation guidelines for dealing with pension plan terminations in which the employer recovers excess assets. The agencies are now proceeding to process cases in accordance with these guidelines. Appropriate steps will be taken by each agency through regulations and otherwise to establish the indicated procedures.

"We believe that the implementation guidelines we are adopting reflect a fair balancing of the rights of plan participants, plan sponsors, and the public interest," said Charles Tharp, executive director of the PBGC. "It is important that plan participants receive the full benefits to which they are entitled at termination, while recognizing the rights of plan

sponsors to any surplus above that. And we believe it is essential that policies in this area encourage the establishment and maintenance of defined benefit pension plans."

* * *

ATTACHMENT: Joint Implementation Guidelines

IMPLEMENTATION GUIDELINES

The following has been adopted by the Department of the Treasury, the Department of Labor and the Pension Benefit Guaranty Corporation to provide guidelines for processing defined benefit pension plan terminations involving asset reversions to the plan sponsor.

1. In accordance with current law, when an employer terminates a defined benefit pension plan, it may not recover any surplus assets until it has fully vested all participants' benefits and has purchased and distributed annuity contracts, to protect participants against the risk that their accrued benefits may be jeopardized by future market fluctuations or other factors.

2. At present, upon plan termination, employers can make lump sum payments to certain participants. In some cases, these lump sums have been calculated on the basis of interest rates that are higher than those available to individuals, thereby reducing the value of those benefits. This problem must be addressed. If employees are offered lump sum payments in lieu of future pensions, the amount of the lump sum must fairly reflect the value of the pension to the individual. The Pension Benefit Guaranty Corporation is developing guidelines for determining appropriate lump sum values.

3. An employer that terminates a sufficient defined benefit pension plan may establish a new defined benefit plan covering the same group of employees. The new plan may grant past service credit for the period during which

an employee was covered by the terminated plan (subject to the limitations of Section 415 of the Internal Revenue Code). The prior plan and the new plan, in combination, may provide benefits for each participant equivalent to those to which the participant would have been entitled if the prior plan had continued without interruption. The PBGC will clarify the fact that a successor plan is exempt from the five year phase-in of benefit guarantees that applies to newly established plans. The above is one example of what will be deemed a successor plan by the PBGC.

4. In the case of a so-called "spinoff/termination", generally no termination will be recognized and any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

   * The benefits of all employees (including those covered by the ongoing plan) must be fully vested and nonforfeitable as of the date of termination.

   * All benefits accrued as of the date of termination in the ongoing plan must be provided for by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant.

   * All employees who were covered by the original plan must be given advance notice of the transaction in similar time and manner as if the entire original plan were being terminated.

5. In the case of a so-called "spin-off/termination" and a so-called "termination/re-establishment" transaction, generally any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

(a) In the case of an ongoing plan described in number 4 above, the funding method for the ongoing plan must be changed on the date of termination by combining and offsetting amortization bases in accordance with §412(b)(4) of the Code. The amortization period for this base will be the lesser of the combined amortization period and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method.

(b) In the case of a new plan established with credit for past service as described in number 3 above, in order to obtain a reversion of surplus assets from the terminated plan, the future amortization period for the unfunded past service liability for the new plan, under Section 412 of the Code, will be the lesser of 30 years and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method for the new plan.

The agencies' analysis indicates that, in spinoff/terminations where the conditions in numbers 4 and 5a are satisfied, the security of participants' benefits is protected by the purchase and distribution of annuities, the statutory minimum funding rules, including the rules described in number 5(a), and PBGC insurance coverage.

6. Employers are reminded that one of the requirements for plan qualification is that the plan be intended to be permanent. In any case, the funding rules generally require that plan funding be on a going concern basis rather than on a termination basis. Thus, the tax consequences of multiple "termination/re-establishments" or "spin-off/terminations" are unaffected by these guidelines and will be determined without regard to whether the specific guidelines described above are satisfied

with regard to each of the transactions. Generally, an employer may not engage in either a termination/re-establishment or spin-off/termination transaction, involving reversion of assets, any earlier than 15 years following any such transaction.

7. The federal income tax consequences of the receipt of reversions, of deductions for contributions to ongoing or successor plans and of the funding of such plans, after the change in funding method, are unaffected by these guidelines.

8. The PBGC will continue to process and the IRS will now proceed to process all pending termination cases.

APPENDIX B

Opinion Letter

85-11

May 14, 1985

STATUTE/REGULATION SECTION:
4044 Allocation of Assets
4044(d)(1)

LETTER:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the proposed termination of the Retirement Plan for Salaried Employees of ***** Plan)[1] and the reestablishment of a defined benefit plan for the same group of employees providing the same benefits as provided in the Salaried Plan with an offset for amounts paid under the Salaried Plan. The Salaried Plan was created as a result of the split-up of The Retirement Plan for Employees of ***** Company (Annuity Plan) as of *****, into the Salaried Plan and the Retirement Plan for Certain Hourly Employees of The ***** (Hourly Plan). As part of the split-up, excess assets of the Annuity Plan were allocated between the Salaried Plan and Hourly Plan in proportion to the accrued benefits under those plans.

This will advise you that PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Annuity Plan followed by the termination of the Salaried Plan is not subject to the requirements of paragraph #4 of the Implementation Guidelines (Guidelines) issued May 24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the agencies). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in

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[1] A Notice of Intent to Terminate the Salaried Plan was filed with the PBGC on October *****, 1984.

pertinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and non-forfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. For about forty years ***** Company (the Company) had maintained the Annuity Plan that covered salaried and non-union hourly personnel. While the Annuity Plan was initially intended to cover only salaried employees, non-union hourly employees were routinely included until about *****. Thereafter, the Company believed it desirable to maintain separate plans for salaried and non-union hourly employees. Thus, when two new plants were opened in the *****, non-union hourly employees in those Plants were provided separate pension plans. No action was taken with respect to the Annuity Plan, however, until the Company undertook a review of the Annuity Plan in *****. In *****, representatives of the Company and of the insurance company that issued a group annuity contract under the Annuity Plan met to discuss a split-up of the Annuity Plan into separate plans for salaried employees and non-union hourly employees with an expected target date of *****. In early *****, senior management of the Company approved the split-up, and in *****, *****, the split-up and other employee benefit changes that the Company had been working on were announced to employees. Form 5310, advance notification to Internal Revenue Service (IRS) of the split-up was filed with IRS on *****.

In *****, the Company was informed by outside advisors of the potential for the recovery of excess assets if a pension plan were terminated and then reestablished. Among other things, consideration was given to withdrawing the notice of

the split-up given to IRS and terminating the entire Annuity Plan, which at that time had not been split up. The Company decided to proceed with the split-up, and the transfer of assets and liabilities to the separate Salaried and Hourly Plans was effected on *****, *****. On *****, the Company's Pension Committee recommended termination of the Salaried Plan following the "termination/reestablishment" approach discussed below. On October ***** 1984, a Notice of Intent to Terminate the Salaried Plan was filed with PBGC.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined plan for the same group of employees covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph #3.

As a general proposition, nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoice Title IV provisions that permit asset distribution merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly split a plan with excess assets into two parts, one part of active participants that continues under the same terms and conditions as prior to the split-up and the

other part for retirees and deferred vested participants (inactives' part), and then terminate the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all participants. Accordingly, the agencies determined that certain transactions, including, but not limited to, the example, set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

PBGC has carefully reviewed the documentation of the above described facts, including internal corporate memoranda and an affidavit from *****, Vice President-Finance and Treasurer of the Company, that you submitted to us. Based on these facts, PBGC has concluded that the split-up of the Annuity Plan into the Salaried Plan and the Hourly Plan followed by the proposed termination of the Salaried Plan with a reversion of excess assets to the Company is not a transaction to which the spinoff/termination requirements of the Guidelines apply. Accordingly, PBGC will recognize the termination and reestablishment of the Salaried Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

Mitchell L. Strickler
Deputy Director

APPENDIX C

Opinion Letter

85-21

August 26, 1985

STATUTE/REGULATION SECTION:
4044 Allocation of Assets
4044(d)(1)

LETTER:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the split-up and proposed termination of the ***** (the "Retirement Plan"). The split-up occurred on *****, when, as the result of collective bargaining negotiations, employees represented by ***** (the "Union") were transferred to the newly created ***** Plan for Hourly Employees (the "Hourly Plan"). That portion of the Retirement Plan's excess assets attributable to the accrued benefits of the Union participants was likewise transferred to the Hourly Plan. ***** (the "Company"), then proposed terminating the Retirement Plan and establishing a new plan, effective as of *****, for those employees affected by its termination.[1]

This will advise you that the PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination of the Retirement Plan is not subject to the requirements of paragraph 4 of the Implementation Guidelines (the "Guidelines") issued on May 23-24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the "agencies"). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in per-

[1] A Notice of Intent to Terminate the Retirement Plan was filed with the PBGC proposing a termination date of *****.

tinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and nonforfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. The Retirement Plan was established on *****, to provide retirement benefits for certain of the Company's employees, including those represented by the Union. At some point prior to the split-up and as part of the collective bargaining process, Company and Union officials met to discuss the termination of the Retirement Plan and reestablishment of a new defined benefit plan. Upon termination of the Retirement Plan all excess assets would revert to the Company. The Company offered the Union the choice of (1) having hourly employees represented by the Locals "participate" in the termination of the plan (and the adoption of a new defined benefit pension plan), in which event all benefits accrued to the date of the termination would be vested (to the extent not already vested) and annuities would be purchased for such benefits, or (2) "continuing" the present situation, in which event "termination" vesting would not apply, annuities would not be purchased, and benefits would continue to be provided by a trust fund.

The Union chose to have its employees, as well as that portion of the Retirement Plan's excess assets attributable to their accrued benefits, transferred to the new Hourly Plan. You have indicated that the Union chose this course due to its concern about the financial stability of insurance companies and its belief that its bargaining position for future benefit improvements would be adversely affected if there were no excess assets in a plan for its members. On *****, the Retirement Plan was split-up and the Hourly Plan created, and this was followed by the termination of the Retirement

Plan and proposed reversion of the remaining excess assets to the Company.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined benefit plan for the same group of employees covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph 3.

As a general proposition, nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoke Title IV provisions that permit asset distribution merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly (1) split a plan with excess assets into two parts: one part for active participants that continues under the same terms and conditions as prior to the split-up and the other part for retirees and deferred vested participants (the "inactives' part"), and (2) permit the termination of the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all par-

ticipants. Accordingly, the agencies determined that certain transactions, including, but not limited to, the example set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

The PBGC has carefully reviewed the events leading up to the split-up and proposed termination of the Retirement Plan. Based on these facts, the PBGC has concluded that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination of the Retirement Plan with a reversion of excess assets to the Company is not a transaction to which the spin-off/termination requirements of the Guidelines apply. Accordingly, the PBGC will recognize the termination and proposed reestablishment of the Retirement Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

Edward R. Mackiewicz
General Counsel

APPENDIX D

Opinion Letter

85-25

October 11, 1985

STATUTE/REGULATION SECTION:
Joint Implementation Guidelines

LETTER:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) on whether the asset reversion guidelines of May 23, 1984, apply to a transfer of assets and liabilities from a single-employer pension plan to a multiemployer plan, with a resulting termination of the single-employer plan.

In your fact situation, a company that currently maintains a single-employer plan covering its union employees is involved in collective bargaining negotiations over an expired collective bargaining agreement. As part of the negotiations, the company has proposed a termination of its single-employer plan, with a resultant reversion of excess assets to the company (as permitted by the plan document). The union that represents the company's employees is willing to agree to the termination subject to certain conditions, one of which is that the company become a participant in, and transfer assets and liabilities to, a multiemployer pension plan to which the union is already a party. The multiemployer plan in question is fully funded.

As you mention in your letter, the PBGC, in cooperation with the Department of Labor and the Internal Revenue Service, has issued asset reversion guidelines to deal with various issues raised in connection with an employer's receipt of surplus assets following the termination of a defined benefit pension plan. It is the agencies' interpretation that an em-

ployer cannot invoke the termination and asset distribution provisions of Title IV of the Employee Retirement Income Security Act (ERISA) merely by taking steps that, in form, appear to bring about a termination of a plan, when, in substance, the transaction does not constitute a full termination. Accordingly, the guidelines state the agencies' determination that, among other things, the law requires that the benefits of participants in an ongoing plan following a so-called "spin-off/termination" be fully vested and annuitized.

Exceptions to the application of these provisions depend on the circumstances of a transaction. The transaction you describe, a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which the spin-off/termination requirements of the guidelines apply. However, if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination under Title IV. A valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer. An intent to circumvent the termination requirements can be indicated by many factors including, but not limited to, the size of the transferor employer relative to the other employers participating in the multiemployer plan, the stability and financial health of the multiemployer plan, and the amount of assets relative to the liabilities that are transferred to the multiemployer plan.

The conclusions set forth in this letter are limited to Title IV of ERISA. Any opinions relating to Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this information is of assistance to you. If you have further questions, please contact the attorney handling this matter, *****, of the PBGC's Corporate Policy and Regu-

lations Department. ***** telephone number is (202) 254-4860.

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